No. 09-548

IN THE

Supreme Court of the United States

JUDY WOOD on behalf of the United States of America,

Petitioner,

v.

APPLIED RESEARCH ASSOCIATES, INC.; SCIENCE APPLICATIONS INTERNATIONAL CORP.; COMPUTER AIDED ENGINEERING ASSOCIATES, INC.; DATASOURCE, INC.; GEOSTATS, INC.; GILSANZ MURRAY STEFICEK, LLP; HUGHES ASSOCIATES, INC.; AJMAI ABASSI; EDUARDO KAUSEL; DAVID PARKS; DAVID SHARP; DANIELE VENEZANO; JOSEPH VAN DYCK; KASPAR WILLIAM; ROLF JENSEN & ASSOCIATES, INC.; ROSENWASSER/GROSSMAN CONSULTING ENGINEERS, P.C.; SIMPSON GUMPERTZ & HEGER, INC.; S.K. GHOSH ASSOCIATES, INC.; SKIDMORE OWINGS & MERRILL, LLP; TENG & ASSOCIATES, INC.; UNDERWRITERS LABORATORIES, INC.; WISS, JANNEY, ELSTNER ASSOCIATES, INC.; AND UNITED AIRLINES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

GAIL D. ZIRKELBACH *
(admission pending)
MCKENNA LONG & ALDRIDGE LLP
1400 Wewatta Street, Suite 700
Denver, CO 80202
(303) 634-4000

Counsel for Science Applications International Corporation

* Counsel of Record

[Additional Counsel Listed On Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

E. LESLIE HOFFMAN
JACKSON KELLY PLLC
310 West Burke Street
P.O. Box 1068
Martinsburg, WV 25402
(304) 260-4942

Counsel for Applied Research Associates, Inc.

JOHN T. MORIN
WORMSER KIELY GALEF & JACOBS LLP
825 Third Avenue,
26th Floor
New York, NY 10022
(212) 573-0635

Counsel for Hughes Associates, Inc.

ALEXANDER M. KIPNIS
ZETLIN & DE CHIARA LLP
801 Second Avenue
New York, NY 10017
(212) 682-6800

Counsel for Skidmore Owings & Merrill LLP

PHILIP C. SEMPREVIVO
BIEDERMANN, REIF, HOENIG & RUFF
570 Lexington Avenue
New York, NY 10022
(212) 697-6555

Counsel for Underwriters Laboratories, Inc.

JASON A. HARRINGTON
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP
150 East 42nd Street
New York, NY 10017
(212) 915-5891

Counsel for Gilsanz Murray Steficek, LLP

KEVIN R. SIDO
HINSHAW & CULBERTSON LLP
222 North LaSalle Street,
Suite 300
Chicago, IL 60601
(312) 704-3333

Counsel for Rolf Jensen & Associates, Inc. and Wiss, Janney, Elstner Associates, Inc.

EDWARD B. KEIDAN
CONWAY & MROWIEC
20 South Clark Street,
Suite 1000
Chicago, IL 60603
(312) 658-1100

Counsel for Teng & Associates, Inc.

QUESTION PRESENTED

Whether Petitioner, who predicated her False Claims Act Complaint on her theory that the tragedy of 9/11 was an elaborate hoax, is entitled to amend her Complaint, which was properly dismissed for failure to plead fraud in accordance with Fed. R. Civ. P. 9(b), based on irrelevant amendments to the False Claims Act.

CORPORATE DISCLOSURE STATEMENT

Respondent Applied Research Associates, Inc. has no parent corporation and no publicly held corporation holds 10% or more of its stock.

Respondent Gilsanz Murray Steficek, LLP has no parent corporation and no publicly held corporation holds 10% or more of its stock.

Respondent Hughes Associates, Inc. has no parent corporation and no publicly held corporation holds 10% or more of its stock.

Respondent Rolf Jensen & Associates, Inc. has no parent corporation and no publicly held corporation holds 10% or more of its stock.

Respondent Science Applications International Corporation is a wholly-owned subsidiary of SAIC, Inc., whose stock is publicly-traded on the New York Stock Exchange under the symbol, "SAI."

Respondent Skidmore Owings & Merrill LLP has no parent corporation and no publicly held corporation holds 10% or more of its stock.

Respondent Teng & Associates, Inc. has no parent corporation and no publicly held corporation holds 10% or more of its stock.

Respondent Underwriters Laboratories, Inc. has no parent corporation and no publicly held corporation holds 10% or more of its stock.

Respondent Wiss, Janney, Elstner Associates, Inc. has no parent corporation and no publicly held corporation holds 10% or more of its stock.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner filed a *qui tam* Complaint under the False Claims Act, 31 U.S.C. §§ 3729-3733 ("FCA") premised on her belief that the events of September

11, 2001 were an elaborate hoax and that, eyewitnesses and video records notwithstanding, no airplanes hit the World Trade Center ("WTC") on that date. Instead, Petitioner's theory underlying her Complaint is that Directed Energy Weapons ("DEWs") in the possession of the United States military destroyed the WTC. Specifically, in her Complaint Petitioner challenged the investigative findings published in a report by the National Institute of Standards and Technology ("NIST"), which Respondents assisted in preparing, as to how and why the WTC buildings collapsed after the 9/11 terrorist attacks. In her Complaint, Petitioner claimed that all of the Respondents participated in fraud by maintaining to NIST that the impact of airplanes caused the collapse of the WTC when they allegedly knew, or should have known, that the collapse was in fact caused by DEWs.

The district court granted Defendants' Motions to Dismiss and dismissed Petitioner's First Amended Complaint because, *inter alia*, Petitioner failed to state a claim upon which relief could be granted pursuant to Fed. R. Civ. P. 12(b)(6), and failed to plead fraud with particularity as required by Fed. R. Civ. P. 9(b). Pet. App. 18a-39a. The district court refused to allow Petitioner to further amend her Complaint on the grounds that such an exercise would be futile. *Id.*

On July 16, 2009, the United States Court of Appeals for the Second Circuit affirmed the district court's decision by Amended Summary Order. Pet. App. 1a-17a. The Second Circuit ruled that Petitioner's Complaint did not meet the heightened pleading standard required by Fed. R. Civ. P 9(b) and that the district court correctly concluded that

granting Petitioner leave to amend her Complaint would be futile. *Id.*

REASONS FOR DENYING THE PETITION

I. THE SECOND CIRCUIT AFFIRMED DISMISSAL OF PETITIONER'S COMPLAINT BASED ON HER FAILURE TO SATISFY THE PLEADING REQUIREMENTS OF FED. R. CIV. P. 9(b)

Although Petitioner attempts to rely upon the recently passed Fraud Enforcement and Recovery Act, Pub. L. No. 111-21, 123 Stat. 1621 (2009) ("FERA"), to justify further amendment of her Complaint, FERA is irrelevant because the Second Circuit dismissed her Complaint for failure to meet the heightened pleading requirements of Fed. R. Civ. P. 9(b) ("Rule 9(b)"); FERA has no bearing on the proper interpretation and application of Rule 9(b).

Any review on a writ of certiorari by this Court is a matter of judicial discretion, not a matter of right and a petition for a writ of certiorari will only be granted for compelling reasons. Sup. Ct. R. 10. In this case, granting review is unnecessary because there is no split among the Circuit Courts as to the heightened pleading requirements provided for in Rule 9(b), and the application of Rule 9(b) to the peculiar facts of this case is certainly not a critical question of law that justifies granting Petitioner's request for certiorari. Moreover, even assuming *arguendo* Petitioner was correct that the relevant issue for consideration is the proper interpretation of FERA, there is no split among the Circuit Courts on that issue either.

It is well-established that because the essence of an FCA case is fraud, Rule 9(b) applies to FCA cases.

See, e.g., United States ex rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 227-228 (1st Cir. 2004); *Gold v. Morrison-Knudson Co.*, 68 F.3d 1475, 1476-1477 (2d Cir. 1995) (rejecting the argument that Rule 9(b) does not apply to FCA cases); *United States ex rel. Kinney v. Stoltz*, 327 F.3d 671, 674-675 (8th Cir. 2003) (noting the overwhelming weight of authority holding that Rule 9(b) requires that "all averments of fraud shall be stated with particularity."). Petitioner herself does not dispute that Rule 9(b) is applicable to her Complaint.

Rule 9(b) provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." To satisfy the pleading requirements of Rule 9(b), a Complaint must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *See Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994). "One of the [further] purposes of Rule 9(b) is to discourage the filing of Complaints as a pretext for discovery of unknown wrongs. [A plaintiff's] contention, that discovery will unearth information tending to prove his contention of fraud, is precisely what Rule 9(b) attempts to discourage." *See Madonna v. United States*, 878 F.2d 62, 66 (2d Cir. 1989) (internal citation and quotation marks omitted). In short, an FCA *qui tam* plaintiff must "set forth the who, what, when, where and how of the alleged fraud." *United States ex rel. Sarafoglou v. Weill Med. College*, 451 F.Supp.2d 613, 623 (S.D.N.Y. 2006).

Petitioner's lengthy Complaint purported to describe an immensely large and complex conspiracy

undertaken by 27 co-conspirators (and the United States Government). Yet, Petitioner failed to allege a single detail regarding any Respondent's supposed role in this alleged conspiracy or to identify a single false claim made in furtherance of this supposed conspiracy. Nowhere did Petitioner allege an act of fraud by a specific Respondent, notwithstanding the fact that Rule 9(b) requires *qui tam* plaintiffs to "connect the allegations of fraud to each individual defendant." *Center Cadillac, Inc. v. Bank Leumi Trust Co. of New York*, 808 F.Supp. 213, 230 (S.D.N.Y. 1992) (citing *Luce v. Edelstein*, 802 F.2d 49, 54 (2d Cir. 1986); *Landy v. Mitchell Petroleum Tech. Corp.*, 734 F.Supp. 608, 620 (S.D.N.Y. 1990) ("Where multiple defendants are asked to respond to allegations of fraud, the complaint shall inform each defendant of the nature of his alleged participation in the fraud."). Petitioner's Complaint impermissibly relied on "sweeping references to acts by all or some of the defendants" without apprising the individual Defendants of the exact accusations against them. *Center Cadillac*, 808 F.Supp. at 230. Moreover, Petitioner's Complaint failed to provide a single employee's name, identify a specific claim, request for payment or date, the content of any discussions or communications, or provide any other particulars indicative of a conspiracy.

When the district court analyzed Petitioner's Complaint, it correctly found that she failed to satisfy the pleading requirements of Rule 9(b), noting:

> Plaintiffs vaguely allege that, for a number of years, all Defendants wrongfully sought payment for services performed in bad faith. They do not cite a single identifiable record or billing submission that they claim to be false, or give a single

> example of when a purportedly false claim was presented for payment by a particular defendant at a specific time.

Pet. App. 34a-35a. Similarly, the Second Circuit correctly noted that Petitioner's Complaint briefly described each of the Respondents in sweeping generalizations, but did not contain any specific allegations as to any given Respondent's involvement in the allegedly fraudulent conduct. *Id.*

The Second Circuit further reasoned:

> [w]hile Wood may genuinely believe that the analysis and information provided by the Contractor Defendants is incorrect, that assertion—even accompanied by supporting evidence for Wood's own theory—does not warrant an inference that the services provided by the Contractor Defendants, and claims for payment submitted therewith, were fraudulent. We agree with the district court that the proposition that "NIST ultimately failed to conclude, consistent with [Petitioner's] hypothesis, that the Twin Towers was destroyed by the military's directed energy weapons," *Wood*, 2008 WL 2566728, at *4, falls short of the "ample factual basis [needed] to support [Petitioner's] charges." *See O'Brien v. Nat'l Prop. Analysts Partners*, 936 F.2d 674, 676 (2d Cir. 1991).

Pet. App. 13(a). The Second Circuit recognized "the Amended Complaint fails 'to specify the time, place, speaker, and even the content of the alleged misrepresentations'" and, therefore, "it 'lacks the 'particulars' required by Rule 9(b).'" Pet. App. 9a (citing *Luce*, 802 at 54). Thus, the district court and the Second Circuit correctly concluded that Petitioner's

failure to allege details supporting a connection between any Respondent and the alleged fraudulent statements in NIST's report violated Rule 9(b) and required dismissal of her Complaint.

There is no basis to disturb the Second Circuit's ruling and grant the petition, especially as Petitioner's outlandish and offensive Complaint falls woefully short of the undisputed pleading standards. Therefore, Petitioner's petition for a writ of certiorari should be denied.

II. THE SECOND CIRCUIT CORRECTLY HELD THAT PETITIONER'S APPEAL DID NOT INVOLVE THE SECTION OF THE FCA MODIFIED BY FERA

Even if the Second Circuit had dismissed Petitioner's Complaint based on its interpretation of the FCA, the enactment of FERA resulted in the retroactive application of only one section of amendments to the FCA, a section that was not at issue in Petitioner's appeal and has no effect on the requirement to plead an FCA violation with particularity. Specifically, pursuant to § 4(f)(b) of FERA, the only retroactive application of FERA applies to 31 U.S.C. § 3729(a)(1)(B), formerly § 3729(a)(2). Prior to the FERA amendments, any person who "knowingly makes, uses or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government" was liable under 31 U.S.C. § 3729(a)(2). This section of the FCA was amended retroactively by FERA to provide that any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim" is liable. 31 U.S.C. § 3729(a)(1)(B). Thus, FERA amended the FCA to

make a subcontractor's intent irrelevant in an FCA case as long as its false statement was material to a Government decision to pay. This change does not provide grounds to allow Petitioner to amend her Complaint as her Complaint is devoid of any allegations regarding subcontractor requests for payment and she never raised § 3729(a)(2) as an issue in her appeal to the Second Circuit.

In addition, in dismissing Petitioner's Complaint, the district court never even attempted to interpret § 3729(a)(2). Moreover, in Petitioner's Second Circuit Brief, she raised three issues for consideration none of which involved the proper interpretation of § 3729(a)(2).

Petitioner first raised her FERA-based arguments in a Motion for Enlargement of Time for Oral Argument, which the Second Circuit denied. Petitioner again raised her argument that FERA somehow justified allowing her to amend her Complaint during oral argument in the Second Circuit. In its Order, the Second Circuit directly addressed Petitioner's FERA-based arguments and dismissed them succinctly, noting:

> In 2009, after Wood's Complaint was filed, the various causes of action in 31 U.S.C. § 3729 were reorganized and restated. *See* Fraud Enforcement and Recovery Act, Pub. L. No. 111-21, 123 Stat. 1621 (2009). *While some of these changes are retroactive, they do not change the analysis herein.*

Pet. App. 8a, n.2 (emphasis added). The Second Circuit, therefore, acknowledged FERA's modifications of the FCA, considered those modifications,

and correctly concluded that they did not affect Petitioner's claims.

As neither the district court's decision nor the Second Circuit's Order was in any way premised on an interpretation of § 3729(a)(2), and Petitioner herself failed to raise the interpretation of § 3729(a)(2) in her appeal to the Second Circuit, the enactment of FERA is entirely irrelevant to the issues addressed by the Second Circuit. Because Petitioner's argument that the FERA changes to the FCA somehow reach her Complaint is wrong, and was properly evaluated and rejected by the Second Circuit, this Court should deny Petitioner's petition for writ of certiorari.

III. EVEN IF THE RETROACTIVE FCA AMENDMENT WERE RELEVANT TO PETITIONER'S ALLEGATIONS, THERE WAS NO "PENDING CLAIM" TO WHICH THE RETROACTIVITY WOULD ATTACH

As noted above, FERA includes a retroactivity clause which provides that "subparagraph (B) of § 3729(a)(1) of title 31, United States Code, as amended by subsection (a)(1), shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act (31 U.S.C. § 3729 *et seq.*) that are pending on or after that date." Pub. L. No. 111-21, § 4(f), 123 Stat. 1625 (2009). In her petition, Petitioner argues that the "pending claims" language applies to all FCA cases pending as of June 7, 2008 and the enactment of FERA should result in the automatic right to amend all such Complaints.

However, the only Courts to address this issue arrived at the opposite conclusion. On remand, the district court in *United States ex rel. Sanders v. Alli-*

son Engine Co., Inc., considered "whether Congress intended the retroactivity language to apply to 'cases' pending on June 7, 2009 [sic.], or to 'claims' pending on June 7, 2009 [sic.]." *United States ex rel. Sanders v. Allison Engine Co., Inc.*, No 1:95-cv-970, 2009 WL 3626773, at *3 (S.D. Ohio, Oct. 27, 2009). That district court held that:

> A "claim" is defined in the amendments to the FCA set forth in the FERA as "any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property . . . " 31 U.S.C. § 3729(b)(2)(A). Neither the amendments to the FCA set forth in the FERA nor the prior FCA include a definition of "case." Thus, a plain reading of the retroactivity language reveals that the relevant change is applicable to "claims" and not to "cases." The new FCA retroactivity clause is not applicable to the Defendants in this case.

Id. at *4; *see also United States v. Science Applications Int'l Corp.*, No. 04-1543, 2009 WL 2929250, at *14 (D.D.C. Sept. 14, 2009) (evaluating the retroactivity and concluding that "[t]here is no reason to depart from the usual rule and section 4(f)(1) will be interpreted to apply to 'claims' as defined in § 3729, that is, requests or demands for money or property. Thus, FERA has no impact on the present action.").

In this case, the evidence is undisputed that none of the claims for payment that could possibly be at issue in Petitioner's Complaint were pending claims for payment as of June 7, 2008; each such claim had been submitted and disposed of long before that date. Accordingly, the retroactive "claims" language in FERA is wholly inapplicable to the instant case and

does not provide a reason for granting Petitioner's writ of certiorari.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

GAIL D. ZIRKELBACH *
(admission pending)
MCKENNA LONG & ALDRIDGE LLP
1400 Wewatta Street, Suite 700
Denver, CO 80202
(303) 634-4000
Counsel for Science Applications International Corporation

* Counsel of Record

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